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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

QUICKEN LOANS INC., a Michigan Corporation Plaintiff, vs. DEMETRIOS A. BOUTRIS, in his official capacity as Commissioner of the California Department of Corporations, Defendant.	Civil Action No. S-03-0256 GEB JFM MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT AND PERMANENT INJUNCTION Hearing Date: April 7, 2003 Hearing Time: 9:00 a.m. Hon. Garland E. Burrell (Courtroom 10) Oral Argument Requested: 15 minutes

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I. INTRODUCTION

Plaintiff Quicken Loans, Inc. has failed to demonstrate that preemption exists such that the California per diem interest statutes, which regulate when a lender may begin charging interest, should be invalidated in whole or part. The Depository Institutions Deregulation and Monetary Control Act (DIDMCA) does not compel preemption of the per diem interest provisions, insofar as the state statutes do not expressly limit the rate or amount of interest plaintiff may charge and they do not frustrate or impair the goals and intent of the federal act. Likewise, the Alternative Mortgage Transaction Parity Act of 1982 (AMTPA) does not preempt the per diem interest statutes as applied to alternative mortgage transactions because they are equally applied to conventional and alternative mortgage transactions. Further, the state statutes do not expressly conflict with the four applicable federal regulations promulgated under AMTPA. Therefore, Defendant respectfully requests this court deny the motion for partial summary judgment.

II. FACTS

In his Response to Separate Statement of Undisputed Facts, Defendant California Corporations Commissioner Demetrios A. Boutris (Commissioner) denies many of the assertions of fact made by plaintiff on the basis that no discovery has yet been conducted; many of the asserted "undisputed facts" pertain to details of Quicken Loan's business and its loan transactions that the Commissioner cannot determine to be true or false at this time. However, the Commissioner has admitted sufficient facts upon which he believes this court may make a substantive ruling on the motion and therefore does not request a delay to conduct discovery prior to responding to the motion.

III. ARGUMENT

A. THE DIDMCA DOES NOT PREEMPT CALIFORNIA LAW.

1. Preemption By DIDMCA Does Not Extend To The California Statutes At Issue.

Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, federal law may preempt state law "either by express provision, by implication, or by a conflict between federal and state law. (Citations omitted)." *Shin v. Encore Mortgage Servs*., 96 F. Supp. 2d 419, 423 (D. N.J. 2000) *citing*

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654 (1995) . In addition, in areas traditionally regulated by the states, such as consumer protection, there is a presumption against finding preemption of state law. *California v. Arc America Corp*., 490 U.S. 93, 101 (1989). "When Congress legislates in a field traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' (Citations omitted)." *Id*. at 101. In *Smiley v. Citibank (S.D.), N.A.*, 11 Cal. 4th 138 (1995) the California Supreme Court found that "historic police powers of the States" extend to banking. *Id*. at 148.

If a statute contains an express preemption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, (1993).

If the statutory language is ambiguous, *Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987), or would work an unreasonable result, the courts may consult relevant legislative history, *Cabral v. INS*, 15 F.3d 193, 194 (1st Cir. 1994), to confirm an interpretation indicated by the plain language. *Strickland v. Commissioner, Maine Dep't of Human Servs*., 48 F.3d 12, 17 (1st Cir. 1996), *cert. denied*, 116 S. Ct. 145 (1995).

There is no clear and manifest intent of Congress to preempt California statutes concerning when the lender may begin to charge interest. Furthermore, to the extent potential conflict preemption is alleged, compliance with both state and federal law is possible, thus obviating the need for federal preemption of the state statute. *See Arc America Corp.*, 490 U.S. at 94.

The first issue before this court is whether the California Corporations Commissioner may enforce the per diem limitation provision of subdivision (o) of California Financial Code § 50204. This provides that a lender may not "require a borrower to pay interest on the mortgage loan for a period in excess of one day prior to recording of the mortgage or deed of trust. . . ." Cal. Fin. Code § 50204(o).

Also at issue is whether the Commissioner may enforce an earlier version of California Civil Code §2948.5[1] (subsequently amended) that read in pertinent part as follows:

> "interest on the principal obligation of a promissory note secured by a mortgage or deed of trust on real property improved with one-to-four residential dwelling units shall not commence to accrue prior to close of escrow if the loan proceeds are paid into escrow or, if there was no escrow, the date upon which the loan proceeds have been made available for withdrawal as a matter of right, as specified in subdivision (d) of Section 12413.1 of the Insurance Code."

For purposes of this motion, the Commissioner's arguments apply equally to the former Civil Code section, which will not be discussed separately. Plaintiff's contention that these statutes are preempted fails to take into account the express language of DIDMCA or the etiology of the Act.

Section 501 (a) of DIDMCA only preempts state laws "*expressly limiting* the rate or amount of interest, discount points, finance charges, or other charges . . . secured by a first lien on residential real property. . . ." 12 U.S.C. § 1735f-7a(a)(1) (emphasis added). Subdivision (o) of California Financial Code 50204 does not fall within the type of activities preempted by DIDMCA because it does not *expressly limit* interest rates or amounts. Rather, the state statute establishes the date upon which the per diem interest may be assessed upon a borrower.

The DIDMCA statutory scheme was born at the end of the 1970s, in a period of extreme highs in home mortgage interest rates. As the court may find helpful, *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 907 (3d Cir. 1989) offers an analysis of historical context and legislative intent:

> "DIDMCA was passed at a time when inflation and interest rates were soaring; in this context, *state usury laws* decreased the availability of home mortgage loans and hindered the ability of financial institutions to pay market rates of interest to depositors since usury laws limited them to lending at rates well below those that the market would have dictated. Thus, the Senate Report that accompanied the bill containing what became § 501 of DIDMCA found:
>
> that where *state usury laws* require mortgage rates below market levels of interest, mortgage funds in those states will not be readily available and those funds will flow to other states where market yields are readily available. This artificial disruption of

[1] It should be noted that the Commissioner's authority to enforce the per diem statute is now codified in California Financial Code section 50204(o), and the California Attorney General, who is not a party to this action, retains jurisdiction to enforce the amended Civil Code section 2948.5.

> funds availability not only is harmful to potential homebuyers in states with such usury laws, it also frustrates national housing policies and programs. . . .
>
> The committee believes *that this limited modification in state usury laws* will enhance the stability and viability of our Nation's financial system and is needed to facilitate a national housing policy and the functioning of a national secondary market in mortgage lending. . . ."

Smith at 12 (emphasis added); *see also* Exhibit A to plaintiff's Memorandum of Points and Authorities, the FHLBB Office of General Counsel Opinion Letter (Quinlan, May 8, 1987) 1987 FHLBB LEXIS 165.

While this goal of promoting the American dream of home ownership is certainly laudable, the California statutory provisions challenged by plaintiff are unrelated to the very type of laws DIDMCA was enacted to preempt: state usury statutes. Yet, plaintiff here seeks to don the cloak of federal preemption to avoid a California provision that does not impair that statutory scheme in any way.

Subdivision (o) is not a usury statute.[2] The per diem interest provisions do nothing more than compel a close relationship between the date interest charges begin and the date of recordation of the deed of trust. The purpose of the California law is to protect the consumer from paying interest on money that has not yet bought him the benefit of his bargain, i.e. clear title to the home he is buying. It does absolutely nothing to frustrate the broad goals of DIDMCA. It does not limit the rate of interest plaintiff can charge. It does not limit the total amount of interest plaintiff can collect, as the rate of interest charged remains within the control of the plaintiff and may be bargained with the consumer. The state law merely encourages lenders to be assiduous in providing borrowers with recorded title by preventing them from charging interest in excess of an allowable one day time period until the deed is recorded.

2. Plaintiff's Authority Is Inapposite Or Distinguishable.

Plaintiff's reliance on *Shelton v. Mutual Savings and Loan*, 738 F.Supp. 1050 (E.D. Mich. 1990) for the proposition that DIDMCA preempted a Michigan "version of a per diem statute" is

[2] California's usury law is found in the California Constitution, Article XV, sec. 1.

misplaced. Although *Shelton* did find preemption,[3] it dealt in pertinent part with a Michigan statute that read as follows:

> "A mortgage loan or a land contract made under this Act shall not provide for *a rate of interest* added or deducted in advance, and interest on the mortgage loan or land contract shall be computed from time to time only on the basis of unpaid balances." (Emphasis added.)

The district court in Michigan struggled with the meaning of the state statutory language, and found at least three possible interpretations, including those urged by both parties to the suit. The district court ultimately found it too ambiguous to interpret, and held that it is "not within the province of a federal court to attempt to read the minds of state legislators. . . ." *Shelton* at 1058.

Therefore, it is simply not accurate to say the *Shelton* case holds that a per diem statute is preempted by DIDMCA. Indeed, that federal court said, ". . . if the state legislature had intended to prohibit lenders from charging interest on undisbursed funds, it could have done so clearly and unambiguously." *Id.* at 1058. Therefore, it remains an open question as to how the *Shelton* court would have ruled on a statute, such as is at issue here, that does not affect the rate of interest. While the *Shelton* court could not interpret the Michigan statute, it apparently concluded the Michigan law was a usury statute. *See Shelton* at 1057. However, the per diem statutes are unrelated to the California Usury Law. *Compare* Cal. Const. Art. XV, §. 1 *with* Cal. Fin. Code § 50204(o).

Next, plaintiff seeks to rely on a 1987 opinion of the Federal Home Loan Bank Board (attached to plaintiff's motion as Exhibit A.) Although it is not disputed that opinions of the FHLBB (now known as the Office of Thrift Supervision (OTS)) are entitled to some weight, this opinion, like plaintiff's interpretation of *Shelton*, falls short of supporting Quicken's position. The FHLBB opinion states:

> "In exempting mortgage loans from state usury limitations, the [Senate] Committee intends to exempt only those limitations that are included in the annual percentage rate. The committee does not intend to exempt limitations on prepayment charges, attorneys fees, late charges, or *similar limitations designed to protect borrowers*." (Emphasis added)

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[3] Defendant's brief in the related case of *Wells Fargo v. Boutris*, S-03-0157 GEB JFM, was in error when it stated that the *Shelton* court did not reach the issue of preemption. Defendant apologizes to the court and thanks plaintiff for bringing it to his attention so that it could be corrected and brought to the court's attention in this matter.

1987 FHLBB LEXIS 165, at page 2 *quoting* S. Rep. No. 96-368, 96th Cong., 2d Sess. 19, *reprinted in* 1980 U.S. Code Cong. & Admin. News 236, 255 (emphasis added).

Opinions of agencies are less noteworthy in some circumstances such as where Congress has spoken directly to the issue. Then, an interpretation rendered by the agency responsible for administering the statute is entitled to no special deference. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 842 (1984). In all events, the courts will reject an agency interpretation that conflicts with congressional intent. *Id.* at 843, n.. 9.

With these guidelines in mind, the Commissioner again invites the court to review the express language and the underlying intent of DIDMCA expressed by Congress, as set forth above, to address the limitations imposed by the usury laws when they impede the loan market. The per diem interest statutes do not seek to impose such limitations. However, the statutes most certainly are "designed to protect borrowers," a goal which the DIDMCA drafting committee thought could peacefully coexist with the goals of the federal statute, and which the OTS[4] recognizes as permissible pursuant to its own regulations. *See* 12 C.F.R. 590.3 (c) ("Nothing in this section preempts limitations in state laws on prepayment charges, attorneys fees, late charges or other provisions *designed to protect borrowers*." (emphasis added.)).

3. The *Grunbeck* Case Is Good Controlling Law.

Grunbeck v. Dime Savings Bank of New York, FSB, 74 F.3d 331 (1st Cir. 1996) considered whether DIDMCA preempted New Hampshire's simple interest statute (SIS). The court failed to find any congressional intent that would allow DIDMCA to preempt the SIS and determined that no express interest rate limitations existed in the SIS.

The *Grunbeck* court emphasized the interpretive importance of the language from Section 501 of DIDMCA "expressly limiting the rate or amount of interest," the same issue under consideration in this case. The court contrasted this language with that contained in companion Section 521 where Congress, as relates to credit cards, preempted all state legislation "with respect to interest rates." *Grunbeck* at 338. The court recognized that Congress was acutely aware that its

[4] OTS is charged with the responsibility of regulating federal savings and loans. 12 U.S.C. §1464.

choice of the distinctive terminology -- "expressly limiting" - would be a primary interpretive tool. *Id.* In other words, this is evidence that if Congress had intended to preempt all state laws relating to interest rates, it could have done so as it did in Section 521. By preempting only those state statutes that "expressly limit" the amount or rate of interest, Congress contemplated state statutes, like the California per diem interest statutes, would not be preempted.

Plaintiff contends that *Grunbeck* "did not involve anything remotely similar to the per diem statute." Plaintiff's Memorandum of Points and Authorities at 8. However, this argument just seeks to avoid the clear and simple holding of *Grunbeck.* In analyzing the preemption issue, the *Grunbeck* court looked to the legislative history and to the reason Section 501 of DIDMCA was enacted:

> "The legislative aim in enacting section 501 focused on "state usury ceilings," [Citations] with particular emphasis on state usury laws which restrict interest rates to below-market levels and result in artificial disruptions in the supply of home-loan mortgage funds."

Grunbeck, supra, at 339.

It is undisputed by plaintiff that the per diem statutes of California do not have any perceptible impact on the supply of home-loan mortgages. Therefore, the purpose for which DIDMCA was enacted is not at issue here.

While plaintiff tries again to distinguish *Grunbeck* by claiming that the per diem statutes are not consumer protection statutes, nothing could be further from the truth. The per diem statutes are intended to prevent the consumer from having to pay interest on a loan for a home to which he does not yet have clear and protected title. The fact that the loan has been "funded" does not provide a homebuyer with his intended or constructive benefit until he has clear title. This limbo in which the buyer can find himself (between loan funding and having title) is exactly what the statute is meant to address. By placing the responsibility for any delays between funding and recording the deed on the lender, the California statutes protect the consumer from an "unseen" cost, in much the same way as did the simple interest statute in *Grunbeck.* Further, nothing in the per diem interest statutes would prevent a lender from disclosing to and bargaining with borrowers for additional fees or charges that it might use to cover any alleged lost per diem interest income.

Additional guidance may be found in *Larsen v. Countrywide Home Loans, Inc.,* 2001 U.S.

Dist. LEXIS 10023 (Ill. 2001). There, the plaintiffs were homeowners who paid off their mortgage early, on August 18, 2000. The lender, however, charged them interest for the entire month of August. The Larsens sued, alleging violation of an Illinois statute prohibiting lenders from charging interest for any period after payment of the principal. The court found that Congress did not mean for DIDMCA to preempt all interest charges since interest charges that constitute prepayment penalties fall outside the scope of the Act. The *Larsen* court noted that other courts have found that state statutes regulating the computation of interest on federally insured loans are not preempted by federal law, citing *Grunbeck.* The court in *Larsen* specifically declined to interpret the term "rate or amount of interest" so liberally as to preempt to any state law that has an effect on how much interest a borrower must pay. *Larsen* at 3. Yet, that is precisely the gist of plaintiff's argument here. As in *Grunbeck* and *Larsen,* such an argument must be rejected.

4. DIDMCA Also Provides An Exception For "Other Charges".

Alternatively, the very statute so relied on by plaintiff does in fact contain an exception under which this court may conclude that California's per diem statute could qualify. Subsection (b)(4) of 12 U.S.C. § 1735f-7a (of DIDMCA) provides as follows:

> "At any time after the date of enactment of this Act (enacted March 31, 1980), any state may adopt a provision of law placing limitations on discount points or *such other charges* on any loan, mortgage, credit sale, or advance described in subsection (a)(1)." (emphasis added)

Whether the per diem charges governed by subdivision (o) of section 50204 of the California statute may be considered "other charges" under DIDMCA, such that California may limit them, is a question of first impression for this court. Because the moneys charged to the borrower are before he has yet to receive the benefit of his bargain, they may be classified as charges rather than interest.

Plaintiff's claim that the California per diem statute is preempted by DIDMCA must, therefore, fail. Plaintiff provides scant case authority in the face of the well-reasoned *Grunbeck* appellate case. The plain reading of the California statute shows no language *expressly limiting* the amount or rate of interest being charged. And, the legislative aim of DIDMCA (to prevent disruption in the supply of home mortgage loans) is not frustrated by California's application of the per diem statute.

B. THE AMTPA DOES NOT PREEMPT THE PER DIEM STATUTES

California's per diem interest statutes are not preempted by the Alternative Mortgage Transaction Parity Act (AMTPA) as these statutes are not in conflict with or expressly preempted by the federal statute or the regulations promulgated by the Office of Thrift Supervision (OTS) pursuant to the AMTPA. *See* 12 U.S.C. § 3803; 12 C.F.R. § 560.220.

Congress enacted the AMTPA to preempt state laws that either prohibited variable interest rate loans or placed restrictions on variable interest rate loans. The AMTPA authorized the OTS to develop regulations for state housing creditors (also known as nonfederally chartered lenders). Thereafter, the OTS identified four regulations that are applicable to state housing creditors engaging in alternative mortgage transactions. These four regulations neither preempt the per diem statutes at issue in this case, as they do not specifically address per diem interest, nor do they interfere in any way with a lender's ability to engage in, or provide, alternative mortgages.

The purpose of the AMTPA was to encourage alternative mortgage transactions, not to create absolute parity between federally chartered lenders and state housing creditors. The authorities relied on by the plaintiff do not support its theory of federal preemption and absolute parity with federal housing creditors. Accordingly, plaintiff's motion for partial summary judgment on this issue should be denied.

1. <u>The Per Diem Statutes Are Not Preempted Under AMTPA.</u>

Pursuant to its delegated authority from Congress, the OTS has promulgated only four regulations that apply to alternative mortgage transactions and which preempt contrary state laws. *See* 12 U.S.C. § 3803; 12 C.F.R. § 560.220. None of these regulations address the issue of when interest may be charged generally, or per diem interest specifically. As such, these regulations cannot be said to occupy the field or expressly preempt California's statutes.

Due to high interest rates available for home loans, AMPTA was enacted by Congress to encourage variable rate mortgages and other creative financing. Alternative Mortgage Transaction Parity Act, Preemption, 67 Fed. Reg. 60542, 60543 (Sept. 26, 2002).[5] Congress directed the OTS as

[5] The Commissioner requests this court take judicial notice of 67 Fed. Reg. 60542, et. seq., a copy of which is provided as Exhibit 1 to an Appendix.

the federal agency responsible for oversight of housing creditors and the application of AMTPA to such entities, to "identify, describe, and publish those portions or provisions of their respective regulations that are *inappropriate for (and thus inapplicable to) or that need to be conformed for the use of*, the nonfederally chartered housing creditors. . . ." Section 807 of title VIII of Act of October 15, 1982, (Pub. L. No. 97—320; 96 Stat. 1545 (emphasis added.)) *codified at* 12 U.S.C. § 3801 note.

In response to this delegation, the OTS promulgated four regulations that are intrinsic to the ability of housing creditors to offer alternative mortgage transactions.[6] 12 C.F.R. § 560.220; 67 Fed. Reg. 60542, 60545 (2002). As stated by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), "Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . . ." Not only did the OTS have an express delegation of authority from Congress in 12 U.S.C. § 3803, its interpretation of that statute was reasonable given the legislative history and underlying purpose of the AMTPA. *Id.*

The four regulations identified in 12 C.F.R. § 560.220[7] as applicable to nonfederally chartered housing creditors, such as plaintiff, are: Imposition of Late Charges (§ 560.33); Prepayments of Real Estate Loans (§ 560.34); Adjustments to Home Loans (§ 560.35); and, Disclosures for Variable Rate Transactions (§ 560.210.) The OTS, addressing these four regulations identified in 12 C.F.R. § 560.220, stated "[h]ousing creditors must comply with these requirements

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[6] At issue in this litigation are the regulations that were in effect at the time the examination was conducted, namely 12 C.F.R. §§ 560.33, 560.34, 560.35 and 560.210. Effective July 1, 2003, sections 560.33 and 560.34 are removed and a housing creditor must comply only with sections 560.35 and 560.210 to make alternative mortgage transactions. 67 Fed. Reg. 60542, 60543, 60544 (2002). In its comments to the regulatory amendments, the OTS reasoned that the repealed regulations were not necessary because they were not adopted to enable federal thrifts to engage in alternative mortgage financing, but for safe and sound fiscal practices. 67 Fed. Reg. 60542, 60544 (2002).

[7] 12 C.F.R. § 560.220 provides:

> Pursuant to 12 U.S.C. 3803, housing creditors that are not commercial banks, credit unions, or federal saving associations may make alternative mortgage transactions as defined by that section and further defined and described by applicable regulations identified in this section, notwithstanding any state constitution, law, or regulation. In accordance with section 807(b) of Public Law 97-320, 12 U.S.C. 3801 note, §§ 560.33, 560.34, 560.35, and 560.210 of this part are identified as appropriate and applicable to the exercise of this authority and all regulations not so identified are deemed inappropriate and inapplicable. . . .

to obtain the benefit of the [AMTPA's] preemption of state laws. All other OTS regulations are *inappropriate and inapplicable* to state housing creditors." 67 Fed. Reg. 60542, 60543 (2002) (emphasis added). Even 12 C.F.R. §560.220 identifies only those four areas of regulation and states that any regulations "not so identified are . . .inappropriate and inapplicable." As none of these regulations address per diem interest, or when a lender may begin to charge the borrower, they cannot preempt California's laws.

Because the OTS was identifying those regulations that are "intrinsic to the ability to offer alternative loans," plaintiff misstates the law when it claims that nonfederally chartered lenders may make variable interest home mortgage loans and 'other alternative mortgage transactions' on the *same terms* as federally-chartered lenders. *See* Plaintiff's Memorandum of Points and Authorities at 10:6-9. Rather, a plain reading of the AMTPA demonstrates that it does not provide for such an interpretation. Even the OTS "has never identified its preemption rules as applicable to state housing creditors under AMTPA." 67 Fed. Reg. 60542, 60544 (2002). Where states laws are directed at regulating all mortgage transactions and are not directed at restricting alternative mortgage transactions, the OTS "is reluctant to encroach upon this state authority. . . ." *Id.*

Plaintiff also erroneously dismisses *Black v. Financial Freedom Senior Funding Corp.,* 92 Cal. App. 4th 917 (2001) as having factual circumstances so different that it "lacks meaningful application" in this matter. Plaintiff's Memorandum of Points and Authorities, at 12:18-20. Under the reasoning in *Black*, plaintiff must comply with subdivision (o) of Financial Code section 50204 and Civil Code section 2948.5.

Black involved an elderly couple that obtained a reverse mortgage from Freedom Investment Fund, Inc. and subsequently brought an action for elder abuse, unlawful business practices, fraudulent concealment, and negligent misrepresentation against several defendants. *Black* at 924. Defendant Financial Freedom Senior Funding Corporation moved for summary judgment on the ground that the AMTPA, DIDMCA, Truth In Lending Act (TILA), and their related regulations preempted the Blacks' causes of action.

The court analyzed the AMTPA and concluded that preemption is limited to those state laws "that prohibit or impede alternative mortgage transactions or that conflict with federal regulations

deemed applicable to nonfederally chartered housing creditors . . . . This interpretation would leave *broad room for state regulation* because there are only four federal regulations with which the transactions of housing creditors must comply . . . . United States Code section 3803(c) can certainly be interpreted as not extending to state laws that concern aspects of those transactions other than those addressed by the four applicable federal regulations." *Id.* at 930 (emphasis added.).

Further, the court concluded that Congress did not intend to occupy the field of all terms and marketing of alternative mortgage transactions, because there was no clear manifestation of congressional intent and there are so few federal regulations deemed applicable to nonfederally chartered housing creditors. *Id*. at 931.

The OTS would concur with the *Black* court's position. "OTS has never identified its preemption rules [12 C.F.R. § 560.2] as applicable to state housing creditors under AMTPA." 67 Fed. Reg. 60542, 60544 (2002). Further, "given the statutory scheme underlying AMTPA, complete competitive parity is impossible." 67 Fed. Reg. 60542, 60546 (2002).

Since Congress directed the OTS to identify those regulations that are applicable to state housing creditors, which OTS did, and none of those regulations conflict with or preempt California's per diem statutes, the plaintiff is required to comply with those statutes.

2. The State Statutes Do Not Frustrate The Purpose Of The AMTPA

The purpose of the AMTPA is to enable lenders to provide alternative mortgage transactions and to prohibit state laws that prevent this type of credit. 67 Fed. Reg. 60542, 60544 (2002). Thus, AMTPA does not preempt subdivision (o) of Financial Code section 50204 or Civil Code section 2948.5 even when state chartered housing creditors make alternative mortgage transactions, because these statutes do not prohibit or impair alternative mortgage transactions.

During the 1970s and early 1980s, high interest rates prevented borrowers from obtaining credit. 67 Fed. Reg. 60542, 60543 (2002). Further, Congress found that many states either did not permit alternative mortgages or imposed higher restrictions on them than conventional mortgages. *Id*. In response, Congress enacted Title VIII of the Alternative Mortgage Transaction Parity Act of 1982 § 801, *codified at* 12 U.S.C. § 3801(b), which provides as follows:

> "(b) It is the purpose of this title. . . to eliminate the discriminatory impact that those regulations have upon nonfederally chartered housing creditors and provide them with parity with federally chartered institutions. . . ."

Id.

"[T]he purpose of AMTPA was to enable all housing creditors to provide credit through alternative mortgages and to preempt state laws that would prevent that type of credit." 67 Fed. Reg. 60542, 60544 (2002). It was not the purpose of AMTPA to place state housing creditors in the same position as federal housing creditors. 67 Fed. Reg. 60542, 60546 (2002).

As set forth more fully above, the OTS has identified only four regulations crucial for state housing creditors to obtain parity and to be able to provide alternative mortgage transactions. 12 C.F.R § 560.220. These are the only regulations that could possibly preempt conflicting state law. The California statutes governing when a lender may begin charging a borrower interest on a loan before he has use of the funds are not covered by any of these categories. The California per diem statutes do not concern imposition of late charges, prepayment of real estate loans, disclosure for variable rate transactions, or adjustments to home loans. *See* Cal. Fin. Code § 50204(o); Cal. Civ. Code § 2948.5; 12 C.F.R. §§ 560.33-560.35, and 560.210.

Compliance with subdivision (o) of Financial Code section 50204 or Civil Code section 2948.5 does nothing to prohibit or impair any lender from engaging in alternative mortgage transactions. Rather, these statutes apply across the board to all loans involving real estate transactions. It also should be noted that in the unlikely event the court finds the California statutes to be preempted, plaintiff represents that it has made approximately 1800 alternative mortgage loans, which would be the only loans impacted by this issue. Plaintiff's Separate Statement of Undisputed Facts, ¶ 5. The AMTPA is inapplicable to the remainder of its business and the per diem interest statutes would remain validly enforceable against other loans it has made.

Plaintiff, moreover, has provided no evidence that the California per diem statutes interfere with its ability to provide alternative mortgages, as the California laws neither prohibit nor impair alternative mortgage transactions, nor do they seek to impose different restrictions than on conventional mortgages.

3. The Intent Of AMPTA Is To Allow Alternative Mortgages, Not To Require Absolute Parity.

The AMTPA was never intended to establish absolute parity between state housing creditors and federally chartered lenders. This proposition is reinforced by the OTS itself and case law interpreting the AMTPA.

Like the plaintiffs in this action, the defendants in *Black v. Financial Freedom Senior Funding Corp.*, 92 Cal. App. 4th 917 (2001) futilely argued "that the purpose of the [AMTPA] is the achievement of absolute parity with federally chartered lending institutions." *Id*. at 931, 932. *Cf.* Plaintiff's Memorandum of Points and Authorities at 1:18-21; 11:5-6; 11:17-19; 11:23-25; 12:16-17. The *Black* court rejected the idea that absolute parity was intended by the AMTPA due to Congress' permitting states to continue licensing; the dearth of federal regulations applicable to nonfederally chartered lenders; and, the reasonableness of treating federally and nonfederally chartered lenders in a different manner. *Black* at 932.

Thus, the *Black* case provides a persuasive analysis of the same issues before this Court.[8] Plaintiff misinterprets the statute when it argues that under the AMTPA it must be treated in all aspects as a federally chartered lender. *See* 67 Fed. Reg. 60542, 60544 (2002).

Plaintiff also mistakenly looks to *Washington Mutual Bank, FA v. Superior Court*, 95 Cal. App. 4th 606 (2002) to find support for its argument that subdivision (o) of Financial Code § 50204 and Civil Code § 2948.5 cannot be enforced against it. Plaintiff's Memorandum of Points and Authorities, at 10:18-27; 11:1-4. Plaintiff, while admitting that Washington Mutual Bank is a federally chartered lender, still claims that the holding in the *Washington Mutual Bank* case is applicable to it and other state housing creditors. Plaintiff's Memorandum of Points and Authorities, at 10:27 11:1-4. However, 12 C.F.R. § 560.2, the regulation at issue in *Washington Mutual Bank* case, by its own terms did not apply to state housing creditors. Rather, only the four regulations

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[8]In *Ansley v. Ameriquest Mortgage Co.* 194 F. Supp. 2d 1062 (CA C.D. 2002), the court, for jurisdictional purposes only, looked at *Black* and other cases to determine if the AMTPA completely preempted California law and concluded that AMTPA "does not control every alternative mortgage issued by every creditor in every situation." *Id.* at 1065. Therefore, complete preemption was not found. *Id.*

identified in 12 C.F.R. § 560.220 apply to state housing creditors, such as plaintiff, when making alternative mortgage transactions. "OTS has never identified its preemption rules [§ 560.2] as applicable to state housing creditors under AMPTA." 67 Fed. Reg. 60542, 60544 (2002). To do so would "lead to an inappropriate result under its regulatory framework." *Id.*

The OTS (referring to 12 U.S.C. § 3802(2)) comments that "state housing creditors must comply with applicable state licensing requirements and must remain or become subject to the applicable regulatory requirements and enforcement mechanisms provided by state law." 67 Fed. Reg. 60542, 60544, n. 11 (2002). Further, OTS concluded "preemption under 12 C.F.R. § 560.2, without the application of the related duties, would lead to an unreasonable regulatory result, *i.e.*, the perverse situation where state housing creditors could engage in mortgage lending – an area that is traditionally highly regulated – unfettered by most state or federal restrictions, thereby creating a regulatory vacuum. Accordingly, OTS declines to identify its preemption rules as applicable to state housing creditors." 67 Fed. Reg. 60542, 60544 (2002).

Since 12 C.F.R. § 560.2 does not apply to state housing creditors, the holding in the *Washington Mutual Bank* case is not applicable to plaintiff's situation as it has provided this court with no evidence to suggest it is a federal housing creditor.

Plaintiff also mischaracterizes the holding of *Illinois Association of Mortgage Brokers v. Office of Banks and Real Estate*, 308 F.3d 762 (7th Cir. 2002) when it implies that the court held that all state rules are preempted so that state lenders have parity with federal lenders. Plaintiff's Memorandum of Points and Authorities, at 11:13-19. In actuality, the issue on appeal in *Illinois Association of Mortgage Brokers* was whether the Home Ownership and Equity Protection Act of 1994 (HOEP) repealed the AMPTA. *Illinois Association of Mortgage Brokers* at 763, 764.

The State of Illinois had issued regulations to augment HOEP pertaining to balloon payments, prepayment penalties, and amortization schedules. *Id*. at 764. The Seventh Circuit Court of Appeals found that HOEP did not repeal the AMTPA. *Id.* at 765, 766. Thus, the regulations issued by the State of Illinois were possibly preempted by AMPTA to the extent that they blocked state lenders from extending credit on terms available under federal regulations. *Id*. at 768. However, the court did not reach the issue of preemption and remanded the case to the trial court to

decide which of the state regulations, if any, infringed on AMTPA and the OTS regulations. *Id*. at 768.

Similarly, plaintiff also misreads *National Home Equity Mortgage Association v. Face*, 239 F.3d 633 (4th Cir. 2001) when it hypothesizes that because federally chartered lenders may charge prepayment penalties, state housing creditors may do the same.[9] Plaintiff's Memorandum of Points and Authorities at 11:23-25. However, the issue in *Face* was whether a state housing creditor could require and enforce a prepayment fee in a mortgage agreement notwithstanding Virginia's law. *Face* at 638.

The court found that 12 C.F.R. § 560.220 applied and, thus AMTPA preempted Virginia's law limiting prepayment fees. *Id*. at 638, 639. Hence, state housing creditors offering alternative mortgage transactions could use prepayment fee terms, not because federally chartered lenders could, but because regulation 12 C.F.R. § 560.220 expressly allowed it.[10]

Because the AMTPA applies only four express areas of regulation over state housing creditors such as plaintiff and none of those regulations expressly prohibit per diem interest charges, the California laws are not preempted. The AMTPA and federal regulations adopted by the OTS were never intended to preempt all state laws, and they are not so pervasive in the field as to preempt the per diem statutes. Further, the California per diem interest statutes do not operate to frustrate the purposes of the AMTPA or limit in any way a state housing creditor's ability to offer alternative mortgage transactions. Therefore, this court should rule that the Alternative Mortgage Transaction Parity Act of 1982 does not preempt subdivision (o) of California Financial Code section 50204 or California Civil Code section 2984.5.

IV. CONCLUSION

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[9] *Shin v. Encore Mortgage Servs.*, 96 F. Supp. 2d 419 (D. N.J. 2000) is similar to *Face*. New Jersey's challenged law prohibited residential mortgage lenders from charging prepayment fees. The court found that this law was preempted by the AMTPA because OTS had issued a regulation on prepayment fees in 12 C.F.R § 560.220. *Id.* at 426.

[10] In *Black*, the court in analyzing *Face* concurred that the prepayment fee regulation by Virginia was preempted because the fees were specifically identified in 12 C.F.R. § 560.220 and thus applicable to nonfederally chartered housing creditors. *Black* at 934.

Although plaintiff's motion seeks to convince the court that DIDMCA preempts California per diem interest statutes, in reality, there is no case law anywhere in the nation that so holds. The statutes at issue do not encroach on the narrow field that DIDMCA preempts, and there is no legitimate policy need for this court to erase from California books a statute that the state legislature considered appropriate for the protection of consumer/borrowers.

Plaintiffs then seek, as a last refuge, some protection under the AMTPA. However, that federal scheme exists to assure the survival and availability of alternative mortgage transactions. The California statutes, again, do not threaten that goal in any way, and the AMTPA has no meaningful application to this case.

For these reasons, Defendant Commissioner respectfully urges this court to deny this motion in its entirety.

Dated: March 24, 2003

DEMETRIOS A. BOUTRIS
California Corporations Commissioner

By: _____
DOUGLAS M. GOODING (CA BAR NO. 83518)
Corporations Counsel